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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1021

EMPLOYEES OF THE DEPARTMENT OF PUBLIC HEALTH & WELFARE, STATE OF MISSOURI, ET AL.,
Petitioners,

vs.

DEPARTMENT OF PUBLIC HEALTH & WELFARE, STATE OF MISSOURI, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

We prefer the statement of the case which petitioners provide in their petition for a writ of certiorari. We set forth that statement as our statement in this case without quotation marks.

Petitioners are employees of five mental hospitals and a cancer hospital operated by the State of Missouri and employees of the state training school for girls operated under the Department of Corrections of the State of Missouri. Respondents are the Department of Public Health and Welfare and various officials having supervision

over the state hospitals and training schools, who are sued in their official capacities and as individuals.

Petitioners brought this class action suit in the United States District Court for the Western District of Missouri on August 4, 1969, to recover unpaid overtime compensation due them under §16(b) of the Fair Labor Standards Act (FLSA), as amended, 29 U.S.C. §216(b). They also seek an equal amount as liquidated damages, as well as attorneys' fees, as provided in the statute.

The District Court in the instant case sustained respondents' motion to dismiss the complaint upon the ground that this is a suit by citizens of a state against the state and as such is barred by the Eleventh Amendment and its principle of sovereign immunity.

A three-judge panel of the Court of Appeals, in a two to one decision, reversed the judgment of dismissal and held that Congress, by its passage of certain amendments in 1966, intended to authorize FLSA suits by citizen-employees against a state, and that the State of Missouri had waived its sovereign immunity to suit by continuing to operate its hospitals and schools after passage of the 1966 amendments extending coverage to employees of those institutions. It based its decision on *Maryland* v. *Wirtz*, 392 U.S. 183 in which this court upheld the validity of the 1966 FLSA amendments (but reserving the right-to-sue issue) and *Parden* v. *Terminal Ry. Co.*, 377 U.S. 184 which held that Congress, under its commerce clause power, could validly subject states to employee suits.

In a rehearing before the Eighth Circuit Court of Appeals *en banc*, that court, in a 5 to 4 decision, distinguished *Parden* and vacated the judgment of the three-judge panel. It thereby upheld the trial court's dismissal of the complaint by the state employees against the State of Missouri agencies.

ARGUMENT

I

Congress in Amending the Fair Labor Standards Act in 1966 Did Not Abrogate a State's Immunity from Suit by Private Individuals in the Federal Courts.

While the petitioners, plaintiffs below, have named various state institutions and their directors as defendants in this case, the federal courts have consistently taken the position that:

> ". . . the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding. . . . And when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants. . . ." (*Ford Motor Co.* v. *Department of Treasury of Indiana*, 323 U.S. 459, 464)

The petitioners seek to recover unpaid overtime compensation, an equal amount as liquidated damages, and attorneys' fees due to the alleged failure of the state institutions at which they were employed to pay overtime in the manner prescribed by the Fair Labor Standards Act (FLSA), 29 U.S.C. §201 et seq. A judgment in the petitioners' favor could only be recovered from the state treasury. Therefore, it is obvious that in essence the petitioners' action is against the State of Missouri and Missouri is entitled to assert as a defense its immunity from suit.

In 1966 Congress amended the FLSA[1] to make the

1. Pub. L. 89-601, 80 Stat. 830.

wage and hour provisions of the Act applicable to state-operated schools and hospitals. *Maryland* v. *Wirtz*, 392 U.S. 183 upheld, as constitutional, the expansion of the Act to reach state-operated institutions. That decision, however, expressly reserved ruling on the question of whether a state could be sued by its employees for violation of the Act.[2] It is that reserved question which the instant case presents.

It is Missouri's position that Congress, in extending the provisions of the FLSA to Missouri schools and hospitals, did not override the state's immunity from suit in the federal courts; and, since Missouri has not consented to the present suit, the decision of the court below, affirming the district court's dismissal of the case for lack of jurisdiction, must be affirmed.

A. An Unconsenting State Is Immune from Suit in Federal Court.

In *Chisholm* v. *Georgia*, 2 Dall. 419 this court held that federal jurisdiction extended to suits by a citizen of one state against another state. Reaction to that decision was immediate. A resolution for an amendment to the Constitution to counteract the effect of the decision was introduced in Congress the day after the decision was handed down, and several states adopted resolutions bitterly denouncing the decision.[3] As a direct result of the decision in *Chisholm* v. *Georgia*, the Eleventh Amendment to the Constitution was submitted by Congress in the fall of 1795 to the states

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2. "... we decline to be drawn into an abstract discussion of the numerous complex issues that might arise in connection with the Act's various remedial provisions. They are almost impossible and most unnecessary to resolve in advance of particular facts, stated claims, and identified plaintiffs and defendants. Questions of state immunity are therefore reserved for appropriate future cases." 392 U.S. at 200.

3. See, Warren, Charles, *The Supreme Court in the United States History*, Vol. I, 1924, pp. 93-104.

for ratification and it appears that ratification was forthcoming within a year after submission.[4]

In decisions since *Chisholm* v. *Georgia*, and the passage of the Eleventh Amendment, the federal courts have shown more deference to state immunity from suit. This immunity today rests, on a constitutional plateau with a broader foundation than merely the literal language of the Eleventh Amendment. In *Hans* v. *Louisiana*, 134 U.S. 1, the court went beyond the express language of the Eleventh Amendment by finding that a state was constitutionally immune from suit by its own citizens. In fact the *Hans* decision thoroughly repudiated the *Chisholm* holding. With respect to sovereign immunity, the majority opinion correctly observed:

> "... As pointed out in *Hans*, the Eleventh Amendment was the prompt response of Congress, the States and the people to the holding of a divided Supreme Court in *Chisholm* v. *Georgia*, 2 Dall. 419, that states were subject to suits by individuals. Supreme Court opinions handed down since Chisholm have repudiated the majority opinion in that case rejecting pre-Eleventh Amendment sovereign immunity on the part of the States. Thus in *Monaco* v. *Mississippi*, 292 U.S. 313, the Court denied the right of a foreign government to sue a State on the basis of sovereign immunity. No express State immunity from such a suit is found in the Constitution. The court quotes views expressed by Madison, Hamilton and Marshall and states:

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4. On February 18, 1793, the court handed down its opinion in *Chisholm* v. *Georgia*. Congress sent the Eleventh Amendment to the states for ratification on September 5, 1794. North Carolina was the last of the "three-fourths" of the states to ratify the Amendment. It did so on February 7, 1795. However, it was not until January 8, 1798, that President Adams in a message to Congress declared the adoption of the Eleventh Amendment.

> "There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been "a surrender of this immunity in the plan of the convention."' 292 U.S. 313, 322-23.

The Court holds:

> "The "entire judicial power granted by the Constitution" does not embrace authority to entertain such suits in the absence of the State's consent. *Ex parte State of New York, No. 1, supra*, p. 497; *Missouri v. Fiske*, 290 U.S. 18, 25, 26.
>
> '4. Protected by the same fundamental principle, the States, in the absence of consent, are immune from suits brought against them by their own citizens or by federal corporations, although such suits are not within the explicit prohibitions of the Eleventh Amendment. . . .' 292 U.S. 313, 329-30."

As well established as the proposition that a state may not be sued in the federal courts by private citizens without consent of the state, is the proposition that a state may waive its immunity and consent to suits in the federal courts. See, i.e., *Parden v. Terminal Ry. Co.*, 377 U.S. 184, 186. However, consideration of the factors that gave rise to the holdings that a state is protected from suits by private individuals, requires that consent to suit should not be lightly inferred. *Great Northern Ins. Co. v. Read*, 322 U.S. at 54.

There is no contention by the petitioners that Missouri has actively consented to this suit, but petitioners argue that Congress, by enacting the 1966 amendments to the FLSA, placed a duty on Missouri to waive its immunity from suit, or cease operation of institutions covered by the amendments. Missouri has not ceased operation of institutions so

covered. And, as we shall demonstrate, Congress has not required Missouri to waive its constitutional immunity from suit.

B. The Fair Labor Standards Act, As Amended, Contains No Language Which Would Subject a State to Suit by Private Individuals in the Federal Courts.

Petitioners state in their brief:

> "As a result of the 1966 amendments, the Fair Labor Standards Act expressly authorizes suits by employees against States to recover monetary compensation for violations of the Act. That authorization is granted in §16(b), which provides, in immediately pertinent part, as follows:
>
> 'Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction. . . .'" (Brief of Petitioners, p. 12)

However, a reading of the portion of §16(b), 29 U.S.C. §216(b), quoted in petitioners' brief, as well as the entire Act, reveals that the Act is entirely silent on the question of private persons suing a state. Further, the petitioners have cited no legislative history, and we know of none which indicates that Congress, in making the Act in 1966 applicable to certain state-operated institutions, gave even cursory consideration to the issue of whether states were to be subject to suits by private individuals under the Act.

In fact, §16(b) of the Act was not touched by the 1966 amendments; it reads today as it did before the time when

state employees were covered by the Act. Since §16(b) makes no reference to suits by employees against the state, application of the "old and well-known rule that statutes which in general terms divest preexisting rights or privileges will not be applied to the sovereign without express words to that effect", *United States* v. *Mine Workers of America*, 330 U.S. 258, is called for in the instant case. In *Mine Workers, supra*, the court went on to observe:

> ". . . Congress was not ignorant of the rule . . . and, with knowledge of that rule, Congress would not, in writing the Norris-LaGuardia Act, omit to use 'clear and specific [language] to that effect' if it actually intended to reach the Government in all cases." (330 U.S. 273)

Nor can Congress be deemed to be ignorant of the proposition that a state may not be sued in the federal courts by private individuals, and in failing to rewrite §16(b) to provide for suits against states, it must have intended that the state's immunity from suit would continued unimpaired.

Because a state's constitutional immunity from suit has a constitutional foundation, a state should not need an exemption in an act of Congress to preserve that immunity; such immunity, rather, should be found unless Congress expressly states that the state's immunity is not to prevail.

Conflicts between state sovereignty and federal preemption constantly result in friction between the federal government and states. To a certain extent the states' immunity from suit in the federal courts buffers this conflict. We do not dispute that Congress may conclude that in certain areas of commerce the states' immunity must give way to paramount federal objectives. However, when this is the decision of Congress, it should be the duty of Congress to clearly and unequivocally so state. To so hold removes responsibility for the creation of a state-federal conflict

from the courts, while fully recognizing the authority of Congress to legislate under the commerce clause. We believe it desirable from the point of view of both the states and the federal courts that the federal courts avoid entanglement in matters of state government, especially in a state's fiscal affairs, whenever possible. This case presents a case where the court may adopt a rule which would accomplish this objective.

C. Section 16(b) of the Fair Labor Standards Act (29 U.S.C. §216(b)) Expressly Recognizes a State's Constitutional Immunity from Suit by Private Individuals in the Federal Courts by Providing for Suits Only in Courts of "Competent Jurisdiction."

Section 16 (b), 29 U.S.C. §216(b), provides for suits by employees against employers for violations of the FLSA in courts of "competent jurisdiction." Section 16(b) makes no reference to the federal courts and no other provision of the Fair Labor Standards Act expressly authorizes suits by employees against employers in the federal courts. Section 16(b) is not a jurisdictional statute. Jurisdiction in the instant case is predicated on 28 U.S.C. 1337[5]. That section is basically the same as the general federal question jurisdiction statute, 28 U.S.C. 1331, with the exception that it eliminates a jurisdictional amount with respect to any civil action or proceeding arising under any act of Congress regulating commerce. The fact that a case arises under an act of the United States does not divest the state of its immunity on the mere ground that the case is one arising under the Constitution or laws of the United States. *Hans* v. *Louisiana*, 134 U.S. 1, 10. See also, *Duhne* v. *New Jersey*, 251 U.S. 311; *Smith* v. *Reeves*, 178 U.S. 436, 447-449; *Ex parte New York*, 256 U.S. 490, 497-498. Since §16(b) does not purport to

5. Paragraph 1 of the complaint in the District Court; appendix in the Court of Appeals, p. 2.

confer additional jurisdiction in the federal courts but restricts jurisdiction in suits by employees against employers to courts of "competent jurisdiction," it is apparent that Congress did not expand federal jurisdiction under the FLSA to reach suits against unconsenting states. In this regard, the present case may be contrasted to *Parden* v. *Terminal Ry. Co.*, 377 U.S. 184, where the court held Federal Employers' Liability Act, 45 U.S.C. §51, et seq., permitted suit by a private individual against a state-operated railroad. Section 56 of the FELA expressly provided that an action may be brought "in a district court of the United States."

II

The Present Case May Be Distinguished from Parden v. Terminal Ry. Co., 377 U.S. 184.

We recognize both the majority and minority opinions in *Parden* v. *Terminal Ry. Co.*, 377 U.S. 184 were of the view that Congress could condition a state's right to carry on activities in interstate commerce on a waiver of the state's right to assert its immunity from suit by private individuals in the federal courts. However, the present case may be distinguished from *Parden* on a number of fronts. As we have already stated, the FLSA is silent on federal jurisdiction, while the FELA, the Act at issue in *Parden*, expressly provides for actions in the federal courts.

In *Parden*, the court was presented with the issue of whether a state-operated railroad was subject to suit by an injured railroad employee pursuant to the FELA in the federal courts. The *Parden* decision in the words of Judge Friendly of the Second Circuit, ". . . was doubtless influenced by the fact that the state was engaging in activity, . . . which was generally performed by private persons or corporations, . . ." *Knight* v. *State of New York*, 443 F.2d

415, 418. For example, with respect to the Terminal Railway, the *Parden* majority observed:

> "The Terminal Railway is wholly owned and operated by the State of Alabama through its State Docks Department, and has been since 1927. Consisting of about 50 miles of railroad tracks in the area adjacent to the State Docks at Mobile, it serves those docks and several industries situated in the vicinity, and also operates an interchange railroad with several privately owned railroad companies. It performs services for profit under statutory authority authorizing it to operate 'as though it were an ordinary common carrier.' 1940 Code of Alabama (recompiled 1958), Tit. 38, § 17. It conducts substantial operations in interstate commerce. It has contracts and working agreements with the various railroad brotherhoods in accordance with the Railway Labor Act, 45 USC § 151 et seq.; maintains its equipment in conformity with the Federal Safety Appliance Act, 45 USC § 1 et seq.; and complies with the reporting and bookkeeping requirements of the Interstate Commerce Commission. It is thus indisputably a common carrier by railroad engaging in interstate commerce."

On the other hand state mental hospitals, a state cancer hospital, and a training school for delinquent girls, institutions involved in the present case, are institutions which the states have historically operated. They are neither operated for profit nor are they proprietary. While there may be some overlap between the functions performed by these state-operated institutions and institutions in the private sector, generally the state institutions operate in areas where alternatives from the private sector are not available. One of the purposes the doctrine of sovereign immunity promotes is to allow the state freedom and flexi-

bility in their fiscal affairs unfettered by judicial interference. Congress, though silent, may be presumed to intend to deny a state benefit of that doctrine when a state operates a railroad. But it does not follow that when a state confines itself to its traditional activities, that Congress, though it would have the power to regulate and, even to require waiver of immunity, would do so silently.

Another distinction between the FELA and the FLSA is that the purpose of the former was to facilitate suits by injured railroad employees to recover damages from their employer, while the object of the latter Act is to regulate wages and hours of work. The authority conferred on employees to sue employers under §16(b) of the FLSA is only incidental to the general purpose of the FLSA, but it is the heart of the FELA.

If the court had ruled in *Parden* that the Terminal Railway was not subject to suit, it would have deprived employees of that railroad of the opportunity to recover damages for injuries, the very opportunity that the FELA was designed to promote. On the other hand, were the court to hold that §16(b) of the FLSA did not authorize suits by employees of state-operated institutions against the state, there are other sections of the Act which assure that the Act will be enforced against the state. Section 16(c), authorizes the Secretary of Labor to file a suit on behalf of employees for unpaid overtime and §17, 29 U.S.C. §217, authorizes the Secretary to file equitable actions enjoining violation of the Act and to recover, restitution of past unpaid wages. Such suits are essential by suits brought by the United States. *Walling* v. *Norfolk Southern Ry. Co.*, 162 F.2d 96; *Walling* v. *Frank Adam Electric Co.*, 163 F.2d 277, 283; and *Mitchell* v. *McCarty*, 239 F.2d 721, 724. Suits by the United States against the state are not prohibited by the Constitution. *United States* v. *Texas*,

143 U.S. 621; *United States* v. *Mississippi*, 380 U.S. 128, 140. The remedies of §17 are quite real as the case pending in the United States District Court for the Western District of Missouri, *Hodgson* v. *Missouri*, No. 19033-2 illustrates. In that suit partial summary judgment, (Appendix of this brief) holding the state liable, has been ordered, and the Secretary of Labor and the state have been ordered by the court to compute the amount of unpaid overtime and arrange for a method of payment.

An interesting aspect of §17 is that once such suit under the section is filed by the Secretary of Labor, §16 of the Act divests employees of their right to maintain a private action against their employer pursuant to §16(b). From the fact that Congress has expressly denied employees of a right to maintain an action under §16(b) once the Secretary of Labor has brought suit under §17, it is apparent that private enforcement is not a paramount objective of the Act. With Congress providing certain situations where private employees are deprived of a right of action, it follows that the intent of Congress would not be frustrated by construing the Act to hold that Congress did not intend to require a state to waive its immunity from suit.

There is sound reason why Missouri prefers to limit actions under the FLSA to suits brought by the federal government. In such cases Missouri's liability is at most the amount of unpaid wages owing under the Act. However, if private employees can maintain suits under §16(b) against the state, Missouri faces the possibility of a judgment for the amount of unpaid wages owing under the Act, an equal amount as liquidated damages and attorneys' fees. It is one thing for a court to find, as was done in *Purden*, that an injured employee is entitled to maintain an action against the state for damages to be made whole,

it is quite another to hold that Congress not only intended that an injured employee be permitted to sue a state to be made whole but that he could recover double. The fact double recovery is authorized by §16(b), we believe negates any intent on the part of Congress to make that section applicable to the states.

In *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, this court found that the congressional policy of uniformity, denial of competitive damages to malevolent employers and public policy preclude employers from securing from employees waiver of the liquidated damages, equal to the amount of the unpaid wages, authorized by §16(b). The position of a sovereign state is beyond that of a private employer and the considerations that called for full enforcement of the remedies authorized by §16(b), in the private sector do not easily transfer to the public sector. Can it be presumed from congressional silence that Congress intended that a state is to give priority to payment of double damages to employees of mental hospitals rather than other necessary and compelling public expenditures such as the care and treatment of patients in those hospitals? One of the purposes the doctrine of sovereign immunity serves is to allow a state to determine the priority to be given the expenditure of public funds. A mandatory obligation to pay double damages and the expenses of litigation is so foreign to the concept of sovereign immunity as to negate any silent intention on the part of Congress to subject the states to private actions under §16(b).

It is not necessary to overrule *Parden;* but that decision should be limited to actions brought under the FELA. We do not believe that even the majority in *Parden* contemplated that every act of Congress which permits private recovery authorizes recovery against the state on the theory of waiver. Yet, if the *Parden* waiver doctrine were applied

to the FLSA, it would follow that the doctrine would apply to all acts of Congress authorizing private recovery. States could be sued for copyright infringement, cf. *Wihtol* v. *Crow*, 309 F.2d 777, 781; or, patent infringement, cf. *Hercules, Inc.* v. *Minnesota State Highway Dept.*, 337 F.Supp. 795; or on scores of other federally created actions. This would stretch the waiver doctrine to the breaking point.

CONCLUSION

For the foregoing reasons, a decision of the court below should be affirmed.

Respectfully submitted,

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